U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-F-P- INC.

DATE: NOV. 23, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of brick paving services, seeks to employ the Beneficiary as an administrative manager. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a master's degree, or a bachelor's degree followed by five years of experience.

The Director of the Texas Service Center denied the petition, and we dismissed the Petitioner's appeal. *See Matter of A-F-P Inc.*, ID# 1434643 (AAO June 22, 2018). We agreed with the Director that the Petitioner did not demonstrate its required ability to pay the position's proffered wage or the Beneficiary's qualifying experience for the offered position and the requested classification.

The matter is before us again on the Petitioner's motions to reopen and reconsider. The Petitioner submits additional evidence of the Beneficiary's qualifying experience and seeks to provide further proof of the company's ability to pay.

Upon review, we will deny the motions.

I. MOTION CRITERIA

A motion to reopen must state new facts, supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). In contrast, a motion to reconsider must establish that U.S. Citizenship and Immigration Services (USCIS) misapplied law or policy based on the record at that time. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must also cite a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of USCIS or Department of Homeland Security policy. We may grant motions that meet these requirements and establish a petition's approvability.

Here, the Petitioner neither alleges that our appellate decision misapplied law or policy, nor cites a pertinent decision, provision, or policy statement. We will therefore deny the motion to reconsider.

II. THE REQUIRED EXPERIENCE

The accompanying labor certification states that the offered position of administrative manager requires at least five years of full-time, post-baccalaureate experience in the job offered. The regulations for the requested EB-2 classification also require the Beneficiary to have at least five years of full-time, post-baccalaureate experience. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree" to include a bachelor's degree "followed by at least five years of progressive experience in the specialty").

On motion to reopen, to support the Beneficiary's claimed employment by a law firm as an administrative manager from 2003 to 2010, the Petitioner submits additional copies of his Brazilian income tax records. The tax records omit the name of the Beneficiary's employer and his occupation for 2003 and 2004, but the documentation appears to support his claimed employer and occupation from 2005 to 2010. The record, however, remains insufficient to establish the Beneficiary's qualifying experience. As our appellate decision indicates, a 2011 nonimmigrant visa application by the Beneficiary states his job duties as a "partner owner" with another Brazilian company from 2007 to 2010. A petitioner must resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Counsel again asserts that the agent who prepared the 2011 application misidentified the other company as the Beneficiary's employer and misstated its business activities as his job duties.[1] Counsel's assertions, however, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The Petitioner must substantiate counsel's statements with independent proof, which may include affidavits or declarations from the Beneficiary, the agent, or others with personal knowledge of the application. Also, if the Beneficiary worked for both firms from 2007 to 2010, he may have served the law firm during that period on a part-time basis. For labor certification purposes, a foreign national's period of part-time employment equals half that amount in full-time experience. *See Matter of Cable Television Labs., Inc.*, 2012-PER-00449, 2014 WL 5478115 *1 (BALCA Oct. 23, 2014) (finding that 16 months of part-time employment equated to eight months of full-time experience). Thus, between 2005 and 2010, the Beneficiary may lack the requisite five years of full-time experience in the job offered. The Petitioner must therefore further explain and document the Beneficiary's employment history from 2007 to 2010.

As our appellate decision indicates, the record also does not explain why a prior 2007 nonimmigrant visa application by the Beneficiary lists his occupation with the Brazilian law firm as "lawyer," rather than as administrative manager. This unresolved inconsistency also casts doubt on the Beneficiary's claimed qualifying experience in the offered position.

Contrary to the requirements of the offered position, the record does not establish the Beneficiary's possession of at least five years of full-time, post-baccalaureate experience in the job offered.

[1] The Petitioner states that the Beneficiary served as an officer, rather than as an employee, of the other company and did not have any job duties.

Likewise, given the unresolved inconsistencies, we cannot find that the Beneficiary has the experience to qualify for classification as an advanced degree professional. We will therefore affirm our appellate decision.

III. ABILITY TO PAY THE PROFFERED WAGE

On appeal, the Petitioner demonstrated its ability to pay the offered position's annual proffered wage of $132,496 in 2017. But we agreed with the Director that the record lacked required evidence of the company's ability to pay in 2016, the year of the petition's priority date. *See* 8 C.F.R. § 204.5(g)(2) (requiring evidence of a petitioner's continuing ability to pay from a petition's priority date onward in the form of copies of annual reports, federal income tax returns, or audited financial statements).

On motion, the Petitioner again omits required evidence of its ability to pay in 2016. Rather, it requests an opportunity to submit an audited financial statement for that year. Regulations, however, do not allow a motion to reopen to include more than one filing. *See* 8 C.F.R. §§ 103.5(a)(1), (2). Thus, to submit an audited financial statement for 2016, the Petitioner must file another motion to reopen.[2]

Lacking required evidence for the year of the petition's priority date, the record does not establish the Petitioner's continuing ability to pay the proffered wage. We will therefore also affirm our appellate decision for this reason.

IV. CONCLUSION

The Petitioner's motion to reconsider does not meet regulatory requirements. The company's motion to reopen does not establish the Beneficiary's qualifying experience for the offered position or the requested classification. Also, the motion to reopen does not demonstrate the Petitioner's required ability to pay the position's proffered wage from the petition's priority date onward.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of A-F-P- Inc.*, ID# 1982207 (AAO Nov. 23, 2018)

[2] In any future filing, the Petitioner must also submit required evidence of its ability to pay the proffered wage in 2018, if available.